

2010 WL 5080276 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,

v.

Terry Lee BRANDT, Defendant-Appellee.

No. 140744.
September 8, 2010.

Court of Appeals No. 288466 Lower Court No. 08-4046

Appellee's Supplemental Brief

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(Oral Argument Requested)

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*II STATEMENT OF QUESTION PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY FIND THAT THE TRIAL COURT ERRED IN SCORING OV 10 WHERE EVEN ASSUMING THAT A CREDIT UNION COULD BE A VULNERABLE VICTIM MR. BRANDT DID NOT ABUSE HIS AUTHORITY STATUS AS THE TERM IS STATUTORILY DEFINED?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

***1 STATEMENT OF FACTS**

Defendant Terry Lee Brandt was charged and jury convicted of embezzlement by agent of \$100,000 or more,¹ and embezzlement from a **financial** institution.² The trial court sentenced Mr. Brandt to 5-20 years imprisonment.

The prosecution's theory of the case was that Mr. Brandt, who was the Chief **Financial** Officer of Cascades Credit Union, transferred money that belonged to the Credit Union to his personal account without permission. The defense never contested Mr. Brandt's guilt on the embezzlement from a **financial** institution charge. The defense challenged the embezzlement by agent count on the theory that the money did not in fact belong to the Credit Union itself. Instead, the money belonged to each individual customer and was only deposited for safekeeping in the general checking account of the Union. *Mr. Brandt's Termination*

On a Monday morning in January of 2008, Terry Lee Brandt, then the Chief **Financial** Officer of Cascades Credit Union, was called to his boss's office (Trial Transcript, hereinafter TT, 102). For years, Mr. Brandt had a gambling addiction (TT, 104). In 2006, he had a relapse (TT, 147). After accumulating nearly \$60,000 in credit card debt, Mr. Brandt started playing the stock market (TT, 147). As a result, between October 2006 and January of 2008, he transferred over \$226,000 from the general checking account of the Cascades Credit Union into personal accounts. Early in 2008, the management of Cascades Credit Union noticed problem withdrawals from the general account and after conducting a few preliminary investigations into the Union's **finances**, called a meeting to talk to Mr. Brandt (TT, 102).

***2** Mr. Brandt admitted to his wrong-doing, signed a written confession and fully cooperated with the Credit Union and the authorities to calculate the precise amount of money transferred (TT, 103-105; 143-148). In addition to speaking with Mr. Dluzen, his boss, Mr. Brandt also fully cooperated with Officer Bertram, who was the investigating officer on the case (TT, 104). Mr. Brandt explained the method of transfer, the precise amounts of each transfer and agreed to release any and all funds currently held in his personal accounts (TT, 108).

Cascades Community Credit Union

Cascades Community Credit Union is a not-for-profit **financial** institution operating one branch (TT, 85). The Board of Directors consists of five volunteers from the community who oversee the Union's operations (TT, 86). The CEO reports to the Board, which in turn reports to the members of the Union, who each own one share (TT, 86). Cascades operates as an ordinary non-profit credit union - people from the community pool their money together in one common account, each of them gets a certificate of deposit, and every member could borrow money from the common fund on terms easier than from for-profit banks (TT, 87). The higher the deposited amount, the higher the ability of the Union is to give out loans to its members (TT, 89).

Mr. Thomas Dluzen, Cascades' CEO, testified at trial that the Credit Union operates like a bank but with minimal profit of approximately one percent on all deposits received (TT, 123). The profit generated usually goes into a separate general ledger account, from where the Union pays its "light bills" and other incidental expenses that arise out of its operations (TT, 87, 117-18). Any excess profit goes back to the members by paying higher interest, dropping fees, etc. (TT, 87).

Mr. Dluzen hired Mr. Brandt in 2001 to be Cascades' Chief **Financial** Officer (TT, 81). As such, Mr. Brandt's primary obligations consisted of keeping track of the books, dealing with ***3** accounting problems, communicating with correspondent banks, etc. (TT, 82). Mr. Dluzen testified that between 10/2006 and 01/2008; Mr. Brandt had transferred funds from the general checking account in which all deposits are held into his personal account on nine occasions (TT, 90-98, 120-21). Mr. Brandt had no permission from Mr. Dluzen or any other officer of the Union to dispose of the funds as he did (TT, 88-89).

The Court of Appeals, in an unpublished opinion, affirmed Mr. Brandt's convictions but remanded for resentencing finding that "the trial court erred when it scored OV 10." The Court found that even assuming the credit union could be regarded as a vulnerable victim, Mr. Brandt did not "abuse his authority status" as that term is defined in the statute." The Court remanded the case to the trial court for resentencing on the embezzlement conviction given that Mr. Brandt's 5 year minimum sentence fell outside the range of the properly scored guidelines. *People v Brandt*, unpublished opinion per curiam of the Court of Appeals, issued 1/28/10 (Docket No. 288466) at 3-4 (Opinion attached as Appendix A)

The prosecution appealed. Mr. Brandt now files this brief pursuant to this Court's June 10, 2010 Order granting "argument on whether to grant the application or take other peremptory action" and indicating that the parties may file supplemental briefs.

***4 I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ERRED IN SCORING OV 10 WHERE EVEN ASSUMING THAT A CREDIT UNION COULD BE A VULNERABLE VICTIM MR. BRANDT DID NOT ABUSE HIS AUTHORITY STATUS AS THE TERM IS STATUTORILY DEFINED.**

STANDARD OF REVIEW: The standard of review for interpreting the sentencing guidelines is de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008)

ISSUE PRESERVATION: Defense counsel preserved this issue by objecting to the scoring of Offense Variable 10 (ST, 10).

DISCUSSION:

The trial court erred in scoring OV 10 where the Credit Union was not a vulnerable victim and Mr. Brandt did not have an authority status to abuse as that term is statutorily defined.

MCL 777.40(1)(b), dictates that ten points should be scored when: "The offender **exploited** a victim's physical disability, **mental disability**, youth or agedness, or a domestic relationship, or the offender abused his or her authority status."

MCL 777.40(3)(d) reads: "Abuse of authority status" means a victim was **exploited** out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher."

The prosecution argued that this Court should go outside the plain words of the statute, by parsing the words rather than reading the statute as a whole, in order to uphold the trial court's scoring of 10 points for OV 10. This Court, however, recently addressed the statutory interpretation of OV 10 in *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

At issue in *Cannon* was whether OV 10 was properly scored where Mr. Cannon was convicted of conspiracy to commit armed robbery. The Court found that "reading the statute as a whole, we conclude that the central subject is the assessment of points for the **exploitation** of *5 vulnerable victims. The statute applies when **exploitive** conduct, including predatory conduct is at issue." *Id.* at 157.

There is no statutory authority or legal basis for adopting the prosecution's argument as there was no **exploitation** of a vulnerable victim in this case. There is no logical construction of the statutory language that would allow for a credit union to be considered a vulnerable victim. As happened following the conflict panel opinion in *People v Melton*,³ 271 Mich App 590; 722 NW2d 698 (2006), the Legislature could amend the statute to broaden the plain meaning of OV 10 if lawmakers decide that scoring points is appropriate where there is no vulnerable victim but someone in a position of authority utilized that position to accomplish a criminal objective.

The definition and the line of examples illustrate that abuse of authority is meant to refer to situations where power is exerted over the victim, not where administrative authority is somehow at issue. Mr. Brandt was an employee of the credit union. While

he was a high ranking employee, he did nothing more than commit a crime that he was able to cover up for a period of time until the checks and balances in place uncovered the discrepancies in the accounting. The Court of Appeals correctly ruled that Offense Variable 10 cannot be scored given the facts and circumstances of this case.

A proper score of zero (0) points for OV 10 reduces the guidelines range. Embezzlement from a **financial** institution is a class D offense. Mr. Brandt's corrected guidelines range decreases from the improper range of 36 to 60 months to 30 to 50 months making his current sentence a departure from the guidelines and entitling him to resentencing. *People v Franscico*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

***6 CONCLUSION**

This Court extensively addressed and unanimously⁴ agreed on the proper interpretation of OV 10 in *People v Cannon*, *supra*. In *Cannon* the Court found that “the statute applies when **exploitive** conduct, including predatory conduct is at issue.” *Id.* at 157. Mr. Brandt's conduct of embezzling from his employer in no way met the statutorily defined conduct in OV 10 when the statute is read as a whole. The Court should deny the prosecution's application for leave to appeal because the prosecution suggested that this Court parse out the words of the statute and give it a different meaning than a reading of the whole dictates. Defendant-Appellee Terry Brandt asks this Honorable Court to deny the prosecution's application for leave to appeal and suggests such action be done peremptorily.

Footnotes

1 [MCL 750.174](#)(7)

2 [MCL 750.180](#)

3 In *People v Melton*, 271 Mich App 590, 592 NW2d 698 (2006) the Court of Appeals held that OV 9 was to be scored solely based upon the number of victims placed in physical danger and that points could not be properly scored based upon **financial** injury.

4 Justice Cavanagh concurred in part and dissented in part agreeing “that points should only be assessed for offense variable 10 (OV 10), [MCL 777.40](#), when the offender has **exploited** a vulnerable victim.” His dissent came from the majority's remand to the trial court where he would have applied “this rule to the facts of this case.” *Id.* at 163.